SOME CONSTITUTIONAL ASPECTS OF TERRITORIAL EXPANSION

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It is sometimes said that the problem of National expansion which now confronts the American people is not a new one; but I insist that in its present aspect it is absolutely new. There have been before, to be sure, propositions for expansion, some of which have materialized in increased territory; but such propositions have always related to territory contiguous to the United States, or at least not so widely separated from it, nor so vastly different from it in character, but that its admission into the Union as a State or States might be fairly said to have been in contemplation at the time of its annexation. All of the treaties of cession have provided in general terms, for such admission of adjacent territory into the Union so soon as the same should be fit for such admission.[1]

The pending treaty with Spain will be the first from which such a provision will be omitted.

The present proposition is for the admission of territory that no man in his senses, with any sort of information as to the situation, condition and population of the territory, can imagine will ever become a State or States of the American Union. If the Philippine Islands are added to the territory of the United States, it can not be with any expectation that they will ever be held by this government in any other relation than that of subject colonies, to be ruled,

[1] These treaties may be found in 8 Stat. at Large, 200, 252; 9 Id. 922; 10 Id. 1031; 15 Id. 539.

beneficently, it is to be hoped, but nevertheless to be ruled from Washington.

This is a proposition of vast importance to the people of the United States and absolutely novel. The problem does not present itself in this light, perhaps, to a majority of those who advocate annexation; but it is because they belong to that optimistic class, governed by sentiment rather than reason, who refuse to burden their minds with investigations of fact, but who trust that somehow and in some way, in the Lord's good time, everything will, by virtue of the good luck which has heretofore attended the American Nation in its various experiments, eventually turn out all right. These men read that the Philippine Islands are eight thousand miles from our shores; but they do not stop to reflect that this means that they are more distant from us than any portion of the Continent of Europe; that they are as far from us as Persia and Arabia and the sources of the Nile: that Manila is as distant from San Francisco as Mecca and Khartoum are from New York, and that their capital city of 250,000 inhabitants contained four American residents during 1896–7. They do not consider that these islands lie wholly within the tropics, reaching to within less than five degrees of the equator, and that, in climate[1] and general characteristics, they are all that is implied by the term tropical and equatorial. And I say this without any disposition to speak disrespectfully of the equator. They lie within a zone in which no white race, let alone Anglo-Saxon race, has ever been able to establish itself successfully in the history of the world. Benjamin Kidd places the practical limits of the tropics under ordinary circumstances at thirty degrees on either side of the

[1] As to climate, see "The Philippine Islands and Their People," pp. 63 et seq. and 517, by Dean C. Worcester. MacMillan Co., 1898.

equator, and says of this belt, "The attempt to acclimatize the white man in the tropics must be recognized to be a blunder of the first magnitude. All experiments based on the idea are mere idle and empty enterprises foredoomed to failure. Excepting only the deportation of the African races under the institution of slavery, probably no other idea which has held the mind of our civilization during the last three hundred years, has led to so much physical and moral suffering and degradation, or has strewn the world with the wrecks of so many gigantic enterprises."[1] The northernmost point of the northernmost island of any consequence in this group, lies less than nineteen degrees from the equator. They are thickly inhabited by savage races of the Malay family, a large proportion of whom are Mussulmans in the South, and Chinese in the North, who have no more desire to be elevated by Anglo-Saxons than the benighted blacks of Wilmington, N. C., who have recently fled from their homes to escape that elevation, which, nevertheless, some score or more of their number underwent because of their inability to get away quick enough.

Of labor there is an endless amount and fabulously cheap.[2] No American workingman will ever think of seeking employment in the Philippine Islands, where a few cents per day would be all that he could expect to receive until fever claimed him for its own. The only class of Americans who could ever be expected to emigrate to the Philippines and engage in business there are capitalists, who might reasonably be expected to undergo the dangers and inconveniences of a pestilential tropical climate for a season, in order

[1] The Control of the Tropics, p. 48, by Benjamin Kidd. MacMillan Co., 1898.

[2] See "Yesterdays in the Philippines," by Joseph Earle Stevens. Charles Scribner's Sons, 1898; "The Philippine Islands and Their People," p. 517.

to reap rich harvests in the markets of the United States by exploiting the great natural resources with the wonderfully cheap labor of the Philippines.

But if this were not so, if they lay in a temperate zone, and were of a character to tolerate or invite Anglo-Saxon colonization, their mere distance from us would make it wholly impracticable that they should ever become States of the American Union. When even Great Britain finds it impossible to admit to participate in her government the enlightened people of Canada and Australia by reason of their distance from the seat of government and consequent differences in interests, we may rest well assured that no barefooted, breech-clouted senator from Luzon will ever require the aid of an interpreter at Washington to explain his meaning to his fellow-senators from Massachusetts or to swap funny stories with his fellow-senator from Illinois.

Unless all history and all precedent are worthless the admission now, or at any future time, of the Philippine Islands into the Union of American States as States is as wildly fantastical and impracticable as the dream of an opium eater.

The question then becomes, is there any place under the American Constitution for permanent colonies, and, if so, what incidents will the Constitution attach to such relation?

It may be asserted with reasonable positiveness that the framers of the American Constitution did not contemplate the possibility of the territorial growth, in any manner or to any extent, of the government they established under the forms of that Constitution. The Constitution contains no provision for annexations, and this omission is itself very significant. It seems exceedingly probable that if the Constitutional Convention had intended or desired that foreign nations, or large portions of them, might be en-

grafted into the American Union by any ordinary governmental agency or procedure, it would have specifically provided therefor in the fundamental charter, and especially have thrown limitations around the exercise of such right. A power of such importance would scarcely have been left to be inferred from the power to make treaties and declare war. For it will not be forgotten that one of the most notable characteristics of the members of the Convention was a jealousy and distrust of each other which led them to provide with extraordinary care and caution against the anticipated encroachments of one State, section or interest upon another. It is hardly conceivable, therefore, that if the New England States had foreseen a possibility of Louisiana or Florida being admitted into the Union without their consent, or if the Southern States had foreseen a like possibility as to Canada, they would not have agreed in demanding and insisting on such constitutional provisions, with reference to their admission and participation in the Government, as might have been deemed sufficient to protect them from the imagined danger, on the one hand of southern, on the other of northern preponderance and domination. But the Constitution says not a word upon the subject, nor was the question ever raised or mentioned in the Convention, so far as the debates have been reported.

We shall have the less difficulty in believing that no such thing as territorial expansion by legislative or executive act was contemplated by them, if we try to put ourselves in their place and recall that they regarded themselves as, and in fact were, ambassadors of independent powers, met together for the purpose of forming an offensive and defensive alliance, but without any intention of surrendering to the central authority one single iota of sovereignty not absolutely necessary to accomplish the purposes of the alliance.

This was the unmistakable attitude of practically all of the members, though they differed somewhat widely as to the extent to which the purposes of the alliance required the separate sovereignties to surrender the attributes of their sovereignty. The Constitution is substantially the compromise of their differences on this question.

But, while the instrument they signed is called a Constitution, they regarded it rather in the light of a treaty, to which their several States were the signatory powers, or as the partnership agreement of a firm of thirteen. The idea of a national entity—of national existence, power and dignity, quite separate and apart from, and superior to the several States of the Union—is a concept of a later age, apprehended, if at all, but very dimly, and by very few of the framers of the Constitution.

Now, no State can become a party to an existing treaty between other States, or entitled to any of the benefits of such treaty, without the consent of all the signatory States. No partnership of thirteen can become one of fourteen without the consent of all the thirteen. It is not a question of majorities. There must be unanimous consent. And if the framers of the Constitution contemplated the possibility (as they may very well have done) that perhaps some day Canada or Florida or Louisiana or Mexico might wish to join them in a like defensive or offensive arrangement, they considered it quite unnecessary to provide for any such contingency in the Constitution, because that instrument was intended only for the uses of the then created partnership, and might or might not be made the basis of some other and future partnership between other partners. That could take care of itself when the time came.

That the acquisition of colonies, to be held in subjection as such, and not erected into States, was within their pur-

view we can not for a moment imagine. Such a proposition would have been received with as much surprise as a present claim of such powers, on behalf of the Board of Education of the city of Chicago. If any proposition for colonial empire had been presented to them, there can be no reasonable doubt that it would have been scornfully rejected, as inconsistent with the principles on which they justified their own independent national existence. They would have supposed that a "decent respect to the opinions of mankind" required that they should not so soon stultify themselves. Nor would they, I fear, have been able to share the opinion of a recent distinguished essayist before the Chicago Literary Club,[1] who expresses the opinion that we "can be trusted to promote *self-government* in whatever part of the world and with whatever *subject populations*." We are not especially surprised to learn that those, to whom such words as "self-government" and "subject populations" suggest nothing incongruous, are enthusiastically in favor of subjecting millions of people on the other side of the globe, to the yoke of freedom. But our ancestors, we may be sure, were not of that number. Indeed, until the present summer, there has never been any doubt, so far as I know, thrown upon this proposition. Certainly those charged by the Constitution with the ultimate interpretation of the instrument have never sanctioned any other view, but have, on more than one occasion, given it solemn emphasis. Thus in the *Dred Scott case*, 19 How. 393, in 1856, Chief Justice Taney said, in speaking of this subject:

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its terri-

[1] Mr. Franklin MacVeagh, Chicago Times-Herald, Nov. 2, 1898.

torial limits in any way except by the admission of new States. That power is plainly given; * * * but no power is given to acquire a territory to be held and governed permanently in that character."

Speaking further of such territory, he says: "It is acquired to become a State and not to be held as a colony, and governed by Congress with absolute authority. * * * It may be safely assumed that citizens of the United States who migrate to a territory belonging to the people of the United States can not be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any laws it may think proper to impose. The principles upon which our governments rest, and upon which alone they continue to exist is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the general government to obtain and hold colonies and dependent territories over which they might legislate without restriction, would be inconsistent with its own existence in its present form."

While there were dissenting opinions in the Dred Scott case, and while some of the conclusions of that opinion were afterward overruled in a trial by battle, no criticism was made by either dissenting justice of this statement of the relation of the government to its Territories, nor was there any thing in the war or its results, nor has there been any judicial opinion since expressed by that court, which tends to weaken at all the force of Taney's statement. On

the contrary, so late as the 141st U. S., in *McAllister v. United States* (p. 174), the court, commenting on the fact that the Constitution does not provide for territorial judges that permanency of tenure which is guaranteed to all other judges of United States courts, says :

"The absence from the Constitution of such guaranties for territorial judges was, no doubt, due to the fact that the organization of governments for the territories *was but temporary and would be superseded* when the Territories became States of the Union."

But if, notwithstanding all these considerations, any doubt remains as to the correctness of the preceding views, it will be removed by a consideration of the circumstances attending the annexation of Louisiana in 1803. The Constitution was then sixteen years old; Jefferson was President, Madison was Secretary of State, and Monroe was one of the two commissioners who negotiated the treaty. No American treaty ever had a more distinguished set of sponsors. By it the District of Louisiana, lately acquired by Napoleon from Spain, and not yet reduced to possession by the French, was transferred to the United States for fifteen millions of dollars.

That this treaty exceeded the constitutional powers of the executive was at first conceded by nearly every one, both Federalists and Republicans.

Jefferson himself expressed the opinion that the treaty made blank paper of the Constitution, and that if the treaty-making power were boundless, "then we have no Constitution." But he, nevertheless, made the treaty and relied for validating it upon an amendment to the Constitution. Two such amendments were drawn by Jefferson, and afterward a shorter one was in fact proposed in the Senate, at the suggestion of Madison, by the Federalist Senator from

Massachusetts, John Quincy Adams, and would probably have been almost unanimously carried but for an unexpected complication having nothing to do with the merits of the question, but in consequence of which it was almost unanimously buried.

Napoleon, in acquiring Louisiana from Spain, had given a solemn pledge "that it should at no time, under no pretext, and in no manner, be alienated or ceded to any other power."[1]

Of course, Napoleon's act in ceding it to the United States was an absolute breach of faith with Spain. Nor had the stipulation been an empty formality with Spain. It had been her intention thereby "to interpose a strong dyke between the Spanish colonies and the American possessions," her Minister for Foreign Affairs declaring, with prophetic tongue, "The United States, having a much firmer hold on the American continent, should they take a new enlargement would end by becoming formidable, and would one day disturb the Spanish possessions."[2] Spain did not, therefore, take kindly to the First Consul's act, but on the contrary protested vigorously; and as the cession by Spain had never been consummated by delivering possession to the French, but the Spanish Intendant was still in command at New Orleans, it seemed likely that Spain might assert that Napoleon's breach of his agreement gave Spain the right to rescind her cession and reclaim the province. Under these circumstances it was thought that any discussion of the constitutionality of the treaty would be "inopportune," as tending to call in question the legality of our

[1] D'Azara to Talleyrand, June 6, 1803. Adam's Hist. of Jefferson's First Administration, II. 58. Chas. Scribner's Sons, 1891

[2] Cevallos to Talleyrand. Adam's Hist. of Jefferson's First Administration, II. 60.

title and encourage Spain to persist in her pretensions. Accordingly Jefferson wrote to his premier, "I infer that the less we say about the constitutional difficulties the better; and that what is necessary for surmounting them must be done *sub silentio*."[1] In the face of this threatened foreign complication all parties concluded, as they have since done on some occasions, to "stand behind the President" and let the Constitution take care of itself.

It thus appears that practically we were committed to the doctrine of annexation by treaty against the real opinion of nearly everyone, by reason of the Spanish grievance against Napoleon, and that if Spain had at that time been less insistent we should not improbably have adopted a theory of the Constitution which would make it impossible for us to now take from Spain her colonies—by treaty, at least.

I assert, then, with considerable confidence, that the framers of the Constitution did not intend to provide, and did not at the time dream that they had provided, for the addition to the thirteen original States and their Territories of foreign territory by any of the governmental agencies or processes provided in the Constitution.

But it long since ceased to be a question of any practical importance what the framers of the Constitution *intended*. It is still the theoretical rule, no doubt, applicable as well to the Constitution as to all other laws and charters, that in construing them it is not necessary to go further than to ascertain the intention of the law-makers.

So late as the Dred Scott decision, Chief Justice Taney, speaking of the Constitution, said: "While it remains unaltered it must be construed now as it was understood at the time of its adoption. It is not only the same in words

[1] *Id.* II. 86.

but the same in meaning, and delegates the same powers to the government and reserves and secures the same rights and privileges to the citizens, and as long as it continues to exist in its present form it speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day."

These are brave words; but since the Civil War, at least, the rule has been substantially a dead letter. Even as early as the Louisiana debates, John Randolph spoke in ill-concealed impatience of what he called the "parchment barriers" of the Constitution, and the country has never permitted itself to be more than delayed, in anything that it really desired to do, by deference to the opinions of the Fathers. It has always acted on the principle, not inaptly expressed by the same essayist already quoted, when he says, "and once more let us not be over impressed in this crisis by constitutional technicalities. Any country with a written Constitution will always be hampered in a new departure."

In construing the Constitution, the rule, though perhaps not openly admitted, has practically become to test its meaning by ascertaining the extent to which the language used can be stretched in the light of modern opinions and modern necessities, real or imagined, with very little regard indeed for what was actually in the minds of the men who used the language. I mention this merely as an historical fact and without any intention of here criticising the tendency. It may perhaps very well be that the Constitution, interpreted according to the intentions of its makers, would

be unsuited to changed modern conditions, and that it was necessary that it should either be perverted from its original meaning or else abandoned altogether; that it should either bend or break. However that may be, the policy of bending was long since adopted. The annexation of Louisiana furnishes one of the most notable instances thereof. It was justified under the power of the President to make treaties by the practically unanimous vote of politicians, who, no doubt, did not want to be accused of "voting for Spain." But the question remained—and the debate was principally over it—whether the acquired territory became by the cession for all purposes a part of the United States, and thus subject to its Constitution and laws, or whether it was simply the property of the United States, to be dealt with as it pleased without regard to the Constitution, the benefits of which, on this latter theory, were reserved for the original contracting States. While the debates on Louisiana can not be said to have settled this question, the legislation in which they resulted proceeded rather on the latter theory—that is, that the conquered territory was not subject to the Constitution, but might be governed arbitrarily by Congress and the Executive without regard to the limitations of the Constitution.

These views received apparent judicial approval in the case of *American Ins. Co.* v. *Canter*, 1 Peters, 511, decided in 1828. This case arose out of and concerned the Florida cession of 1819.

In it the court held that certain territorial courts established in Florida by Congress were non-constitutional courts; that is, that they were valid courts and exercised a valid jurisdiction, although if Florida had been a State the law creating such courts would have been invalid.

This decision, while containing some inconsistent state-

ments, seems at first blush to go a long way toward declaring the uncontrolled power of Congress over an annexed territory, irrespective of constitutional restrictions: but as thereafter limited and defined in *McAllister* v. *United States*, 141 U. S. 174, this apparent tendency of the decision in the Canter case disappears. It is there explained, upon reasoning which seems irrefutable that the judicial power of the United States over Territories is of two sorts; first, that which the United States exercises over all of its territory, whether State or territorial; and, second, that which it exercises over the Territories alone, by reason of the fact that in the Territories Congress is the supreme legislative body, exercising there, in addition to its general rights over the United States, all the powers which might be exercised by a Territorial Legislature.

The next notable judicial contribution to the question under discussion was rendered, twenty-eight years after the Canter case, in the Dred Scott decision. So far as it relates to the question now before us, the opinion of the court, rendered by Chief Justice Taney, is very able and has not been altered or reversed by either the catastrophe of domestic revolution, or by any subsequent pronouncement of the court which rendered it. A few quotations from this opinion can not well be avoided, even if it were possible to improve upon them.

"The power of Congress over the person or property of a citizen," says the Chief Justice, "can never be mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizens are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the Constitution, from which it derived its own existence and by virtue of which alone it

continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it can not when it enters a Territory of the United States put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It can not create for itself a new character, separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved."

This has been many times reiterated since the war. Thus in *Murphy* v. *Ramsey*, 114 U. S. 15, the court, while affirming in the broadest terms the political power of the general government over the Territories, say: "It may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. * * * The *personal and civil rights* of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, State and National; their *political rights* are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. * * * If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories *to become States in the Union*, still the conclusion can not be avoided that the action of Congress here in question is clearly within that justification."

In the great Mormon Church forfeiture case, 136 U. S. 1, the court said:

"Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from

which Congress derives its powers, than by any express or direct application of its provisions."

This language was quoted with approval in *McAllister* v. *U. S.*, heretofore cited, and in *American Pub. Company* v. *Fisher*, 166 U. S. 464, wherein it was held that the Constitution guaranteed to the citizens of the Territories of the United States the right of trial by jury. It must now be accepted as the settled and unalterable rule of construction with reference to the power of the general government over the Territories.

What then are those fundamental limitations in favor of personal rights which were "formulated in the Constitution and its amendments, and with which the government can not interfere within the Territories of the United States?" A catalogue of them would require a recital of the entire Bill of Rights and of the 14th Amendment, as well as of some other portions of the Constitution; but there are certain clauses which are of especial importance with reference to the proposition now under discussion. Such are the provisions that all taxes and excises shall be uniform throughout the United States; that the right of jury trial as at common law shall not be denied, nor the writ of *habeas corpus* suspended. No person can be held to answer for crime except upon the presentment or indictment of a grand jury; and the right to become citizens of the United States, and, as such citizens, to go freely, without hindrance or obstruction on the part of Congress or of any State, from any portion of the country to every other portion, will be inviolable. In view of the particular proposition now mooted, this last right, affirmed by the Supreme Court in the case of *Crandall* v. *The State of Nevada*, 6 Wall. 35, to be derived, not so much from any particular provision of the Constitution as from its general nature and purpose, is one of the most important.

The right to become a citizen of the United States has been affirmed very recently by the Supreme Court in the case of the *United States* v. *Wong Kim Ark*, 169 U. S. 649, decided on the 28th day of March, 1898, in which it is affirmed that the children of Chinese unnaturalized and unnaturalizable parents, born within the United States, are by virtue of the 14th Amendment to the Constitution, citizens thereof, and entitled to all the rights, personal and political, of other citizens of the United States.

It results, from the foregoing considerations, first, that it is wholly without the power of the government to acquire colonies not so fitted or located as to be prospective States of the American Union. This limitation upon the powers of the government, however, can probably not be enforced, because the Supreme Court will be bound to assume that any territory taken is acquired with the intention of ultimately erecting it into States of the American Union, however notorious it may be that such a consummation will be impossible. It will feel bound to impute to Congress and the Executive sincerity of motives, just as it felt bound to impute to Congress and the Executive such sincerity of motive in the law subjecting the circulation of State banks to a tax of ten per cent for the sake of revenue,[1] when to every one, except the court in its judicial capacity, it was perfectly evident that such tax could never result in a penny of revenue, but that the sole purpose and effect of it was and must be the extinguishing of such circulation—an end not attainable under the Constitution except by such indirection. There appears to be no method known to the Constitution by which the motives and beliefs of the other departments of the government can be put upon trial, and if Congress and the Exec-

[1] Veazie Bank vs. Fenno, 8 Wall. 533.

utive affirm their belief that the moon is made of green cheese, or may by irrigation and the introduction of heating plants be rendered suitable for colonization, the Supreme Court will assume that they so believe. This is one of those constitutional provisions, then, which depends for its enforcement upon the zeal of those who love their country and its institutions, and would not willingly see them perverted from their fundamental purposes.

Second: Such Territories, once annexed, it follows from the foregoing considerations that they can not be held in military subjection; that they can not be ruled arbitrarily, either by the President or by Congress, or by both combined; that the Philippino will have the same personal rights under the Constitution as the citizen of Illinois; that the writ of *habeas corpus* must always be available to him; that trial by jury can not be abridged; that no separate scheme of imposts or excises can be enforced in such colonies different from that in the mother country, and that all the inhabitants of such annexed territory, or at the very latest, their children born subsequent to the annexation, must have free access to all portions of the United States and the same political rights as other citizens in like situation. In view of this last proposition it is scarcely to be wondered at that the most strenuous opposition thus far developed to this scheme of annexation comes from the laborers of the country and their leaders.

Perhaps, in point of fact, we need anticipate no particular deluge of immigration from these islands, as the natives of the tropics seldom care to incur the rigors of more northern climates, or flourish if they do; but with the removal of all custom houses between the Philippines and the markets of the United States it will be immaterial whether the cheap labor of these millions of savage and semi-savage people

competes with our labor in our own workshops, or indirectly by throwing its products into our markets.

The talk of maintaining in the Philippines the policy of an "open door" is idle talk unless either the Constitution is to be abrogated or the whole country is to be thrown open in like manner to the trade of the world. And how will the tropical and exclusively agricultural Philippinos enjoy paying tariff taxes of fifty to sixty per cent for the exclusive benefit of manufacturers on the other side of the globe, and of their workmen, many of whom receive for a day's labor as much as a Philippino earns in a month? Or will the beneficiaries of protection consent to relieve us all of the taxes levied upon us because it will be manifestly unjust to exact them from the Philippinos? Shall we maintain our anti-Chinese legislation while perforce admitting to all portions of our territory, and to all the rights of citizenship those who in the Philippines are the servants of the Chinese? How will juries, grand and petit, and the legal machinery appertaining thereto, work among the hordes of illiterate and degraded wretches who compose so large a proportion of the population of these islands? And if we apply our navigation laws to them, as we must, unless we repeal them altogether, can we send our soldiers to put down rebellion against a policy which so short a time ago was an efficient cause in inducing rebellion on our part against our mother country? If we attempt to extend to them even that portion of our anti-Chinese laws which would forbid the further immigration into those islands of the most thrifty and prosperous people now inhabiting them (as we must, unless we are prepared to abandon our present anti-Chinese policy at home), what answer shall we have for them when they quote that specification of the Declaration of Independence wherein our fathers indicted the King of Great Britain, because "He has endeavored to

prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their immigration hither, and raising the conditions of new appropriations of lands."

It is sometimes said that we can manage or mismanage the Philippinos as we have the Indians (*absit omen*), and that no greater constitutional difficulties will be found in one case than the other. But even if our dealings with the Indians were not a frightful warning to all people who go forth lightly to impose their rule on inferior races, the conclusion is not a just one. We have managed to deal with the Indians as we have, possibly without violating the Constitution, because of their separate and independent tribal organization pertinaciously maintained by them. They have been in contemplation of law, independent, co-ordinate nations, with whom our relations were those of treaty or agreement. Our relations to the Indians have been thus defined by the Supreme Court:

"These Indian Governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged from the time of the first immigration to the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government."

The territory occupied by them from time to time was not subject to the Constitution of the United States, because it was not part of the territory of the United States, but of

[1] Dred Scott v. Sanford, 19 How. 393.

the Indian nation or tribe inhabiting it; surrounded, to be sure, by the territory of the United States, and ultimately to revert to that nation if the Indian title should ever be extinguished. Down to 1871 all our relations to these tribes or nations were governed by treaty, as fully and formally as our relations with Great Britain or Spain. Since that time legislative enactments assented to by the Indians, and compacts and agreements not amounting in dignity to treaties, but substantially the same in fact, have taken the place of formal treaties. But so soon as the Indians have abandoned their tribal organizations, as many of them have, and entered among the body of the people of the United States, they and their children have become citizens of the United States. There exists no evidence that such conditions exist or could be brought to exist in the Philippine Islands. Nor are we proposing to make a treaty of annexation with native tribes, but with Spain. Spain has never recognized any independent sovereignties in the islands, and it appears clear that the legal status of the entire population (except unnaturalized foreigners), so far as it has been brought under Spanish dominion, is that of subjects and citizens of Spain. In acquiring the islands we shall acquire them as subjects, and, if not them, their children, as our fellow-citizens under the fourteenth amendment to the Constitution, as construed in the case of Wong Kim Ark.

Shall we not pause before we incur the responsibility for them and for ourselves of such action? Is it not clear that our Constitution was intended for a homogeneous self-governing people—that under its provisions no place exists for foreign colonies and subject races? And if we were not "hampered by a written Constitution," can we now avow and put in practice the right of the strong to take, and of him

who can to govern the weak, without being false to our history and to those traditions which have been our proudest heritage for a hundred years?

Shall we not rather leave it to nations not thus hampered by either constitutional or moral scruples, to go forth to conquer and be conquered, to spoil and to be spoiled, in the old familiar way that has filled the world with woe since time began—remembering for ourselves that it is just as true now as it was in the days of George the Third, that governments derive "their just powers from the consent of the governed"?

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